

The Hand on the Faucet

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Maximilian Steinbeis Sa 3 Jun 2017

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Dear Friends of Verfassungsblog,

Cutting off the bad guys from their money supplies is a well-established policing strategy, but is it also the right way to sanction attacks on the rule of law and democracy? We have seen this question arise twice this week: First, the German neonazi party NPD, after being found anti- but not unconstitutional by the Federal Constitutional Court (don't ask), is about to be stripped of its claim to state funding by means of a constitutional amendment, on which project the Home Affairs Committee of the Bundestag has heard half a dozen of experts last Monday and received some well-founded criticism. Second, the constitutional capture in Poland and Hungary seems to meet with some resistance on the EU member state level at last, with the German government's proposal to make the disbursal of EU structural funds in one way or another dependent of the recipient's compliance with the rule of law.

At first sight, this looks like good news: that the EU must finally take action to remind the Hungarian and Polish governments of their obligations under Article 2 of the EU Treaty has been a recurring demand on Verfassungsblog for months and years now (e.g. [here](#), [here](#), [here](#) and [here](#)). The national governments, above all the German, had hitherto shown little inclination to pick a fight with their illiberally-minded peers in the East. This seems now to have changed now under the impression of the painful rebuff Germany and Austria met with their plea for a modest degree of European burden-sharing in terms of asylum and refugee protection.

The logic behind the German proposal is not unlike that of the NPD party financing amendment: we cannot let the evildoers pursue their sinister aims with our money! The Polish and Hungarian governments are throwing about all sorts of social benefits to buy the consent of their respective populations and keep them happy und uncomplaining about the erosion of their rights, which they can only afford thanks to the support from the EU funds most of which will end up in the pockets of their cronies anyway. Cutting their funds, unlike constitutional exhortations, cannot be shrugged off by Orbán and Kaczynski as inconsequential liberal piety but would hit them where it really hurts.

There is a lot to be said for that. And yet, at a second glance, the German proposal gives the European debate on Poland and Hungary a spin that I find rather worrisome.

The Polish and Hungarian governments are not a problem for Europe because we dislike them so much. They are because they do not accept constitutionalism. Which is not a moral category. Constitutionalism means being legally bound to keep the Other possible – minority positions, human dignity, dissenting opinions. Constitutionalism means exercising power because and as far as it can be justified by constitutional law. Who does not accept this commitment and is granted a seat at the EU Council table will contaminate the entire legislative and decision-making mechanism of the EU as a whole. The logical thing to do is to deprive him of his voting rights under Article 7 TEU.

Cutting the structural funds instead may be more efficient sanction-wise but misses the core of the problem. Instead of quarantining a government of constitutionally dubious credentials we would moralize the problem. We would assume a position of righteousness which entitles us to bring the sinner back to the path of virtue by force: make amends or pay! We would make the poorest suffer for the wrongdoings of the powerful and alienate the still overwhelmingly pro-European Polish people, punishing them for having voted for the wrong party. And all this coming from Germany. If the goal of the exercise were to breed euroscepticism and anti-German resentment, then efficiency would be guaranteed, indeed. Furthermore, a link between structural funding and sanctions for rule of law issues implies that the latter remain primarily a problem of the poorer states – which, firstly, appears oblivious to the recent electoral near-catastrophes in Austria, the Netherlands and France, and, secondly, only deepens the impression of Old-Europe self-righteousness.

In addition, I do not see by which procedure such a sanction should be imposed, and by whom. EU Budget Commissioner Oettinger talks of "[conditionalities](#)" which are to be linked to the transfer of funds. Is it a rule-of-law troika he has in mind, with the Commission, OLAF and the Fundamental Rights Agency watching over every promotion of a judge before the release of structural funds?

I cannot blame Commission President Juncker for calling that plan "[poison](#)" for Europe. I would be all the happier if he could finally find it in him to listen to his Vice-President Timmermans and let the Commission do its work as guardian of the Treaties. In Poland, President Duda had pardoned a PiS enforcer charged with forgery so he could be appointed chief of the intelligence service, even before the man had been ultimately convicted. Last week, the Supreme Court declared the pardon invalid as an infringement upon the prerogative of the judiciary – which decision the President swiftly declared invalid itself, in the well-tried PiS manner. Even if the fight for the Constitutional Court could be seen as lost, the fight for the judiciary at large and the rule of law is certainly not, and there is still a great deal a sufficiently determined EU Commission could make its voice heard about. As to the Hungarian veto, that could be taken care of by opening an Art. 7 procedure against both Poland and Hungary, as Kim Scheppele has shown.

Talaq, Talaq, Talaq!

It is by means of a constitutional amendment that the politically already impotent NPD is to receive the final, disfunding blow, which is why it is hard to criticize it a problem of constitutional law. In terms of constitutional policy the criticism is all the more pungent: SVEN JÜRGENSEN describes how the Grand Coalition thereby undermines the [principle of equal opportunity for political parties and plays into the Freund/Feind scheme of the right-wing extremists](#). "Political parties are banned if they have the potency to jeopardize our constitutional order. Not less, not more." That the amendment might entail some unexpected consequences for the ability of the security services to keep the NPD under observation, according to several experts at the Bundestag hearing, is reported [here](#) by me.

Young Sebastian Kurz, possibly Austria's next head of government, has redesigned his time-honoured ÖVP party into a electoral machine tailored exclusively to himself – a very Austrian transaction, according to STEPHAN LENZHOFER, explained only by the [absence of effective party regulation](#) in the alpine republic.

In the Ukraine, President Poroshenko has banned Russian social networks, search engines, email services and TV stations in his country, which PETER VAN ELSUWEGE measures on the scale of the European Convention on Human Rights' guarantee of the freedom of expression, although [not entirely without sympathy](#) for the difficulties caused by Russian interference and an ongoing civil war.

The constitutional referendum in Turkey from two months back does not cease to concern us. ALI ACAR [explains](#) how the top electoral authority justified its decision to declare unstamped ballot papers valid, and considers that a complaint to the European Court of Human Rights would be in no way futile.

The Singapore opinion by the ECJ keeps providing cause for reflection three weeks after the fact, too. DANIEL THYM [shows](#) that the Court "gives explicit judicial blessing to the option of 'facultative' EU-only agreements, although it hides that innovation behind an inconsistent use of the notion of 'shared' powers".

Another important ruling came from Luxembourg this week about the nearly classical *Zambrano* constellation of third-country parents of Union citizen children and their right of residence. IBRAHIM KANALAN's analysis of the judgment is [here](#).

In India, the Supreme Court has to decide on the Muslim practice of allowing men to divorce their wives without further ado by saying thrice "*talaq*". To adjudicate on the constitutionality of this practice is a tricky business in the current climate of religious tension in India, as MENAKA GURUSWAMY [reports](#).

FABIAN STEINHAUER's new column "*Neues vom Glossator*" has been launched this week with an answer of

unmistakably Steinhauerian brilliance to the question: "[Why Glossators?](#)" From now on every Monday on Verfassungsblog!

Elsewhere

MANUEL MÜLLER is [not a fan](#) of a linkage of structural funds disbursal and rule-of-law enforcement in the EU either.

DANIEL TODA CASTÁN is concerned about the "[non-disputatious democracy](#)" in [Spain](#) and sees a constitutional crisis looming as a result of the unresolved independence conflict with the Catalans.

MARIA HAAG is pleased with the [Chavez-Vilchez ruling of the ECJ](#) as a success for the rights of children in the EU.

BARBARA OOMEN and RICARDO RODRIGUES DE OLIVEIRA provide an overview of the legal situation in the dispute over the [distribution of refugees in Europe](#) and the various pending or already decided court proceedings.

OLIVIER BEAUD finds in the new [government directives in France](#) a lot of constitutional matter for reflection.

MONICA HAKIMI examines the question of how the "red line" of the French President Emmanuel Macron is related to the international law of [ius ad Bellum](#) if it comes to further poison gas attacks in Syria.

HAROLD HONGJU KOH explains why US President [Donald Trump's decision to quit the Paris Convention](#) on climate change, to quote a German proverb, will not be legally eaten quite as hot as it is politically cooked right now, DUNCAN HOLLIS points out that much depends on [how exactly the US plans to get out of the agreement](#), and ERIC POSNER cannot see for the life of his what the "[very odd Kabuki of the climate pact withdrawal](#)" is actually about.

In the next days, we plan to document an important panel at the University of Oxford about the constitutional situation in Poland, with proponents of both sides of the dispute, among them the new constitutional judge (or, as some have it, anti-judge) Lech Morawski, and additional comments by Paul Blokker and Tomasz Konieczny.

So much for this week. All best, and take care,

Max Steinbeis

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